

**IN THE STATE COURT OF COBB COUNTY**  
**STATE OF GEORGIA**

MELTON, et al.,

CIVIL ACTION

Plaintiffs,

FILE NO.: 14-A-1197-4

vs.

GENERAL MOTORS LLC, and

THORNTON CHEVROLET,

Defendants.

**Certified Copy**

The transcript of the CIVIL MOTION proceedings in the above-styled case on Saturday, August 9, 2014, before the **HONORABLE KATHRYN J. TANKSLEY**, in the State Court of Cobb County, Cobb County Courthouse, Marietta, Cobb County, Georgia.

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**P R O C E E D I N G S**

1  
2 (August 9, 2014; State Court of Cobb County; in open court.)

3 THE COURT: Good morning.

4 ALL COUNSEL: Good morning, Your Honor.

5 THE COURT: Thank you for that show of respect to the  
6 Court.

7 This morning we are here for an expedited hearing in  
8 the Melton versus General Motors and Thornton Chevrolet,  
9 and I have the couple of matters I want to take up before  
10 we proceed.

11 First, for the record, who is here on behalf of the  
12 plaintiff?

13 MR. COOPER: Yes, Your Honor, Lance Cooper here on  
14 behalf of the plaintiffs, along with Jere Beasley, Greg  
15 Allen, and Ben Baker from the Beasley Allen firm.

16 THE COURT: That's not Ben Baker. So who is that guy?  
17 I know who Ben Baker is.

18 MR. COOPER: And then Ken Bernard here from Douglas  
19 County.

20 MR. BAKER: I'm hiding in the corner.

21 THE COURT: Okay. Thank you.

22 MR. COOPER: And then Pat Dawson and Drew Ashby from my  
23 firm.

24 THE COURT: Okay. Thank you.

25 And then on behalf of the defendant?

1 MR. INGRAM: Good morning, Judge, Robert Ingram, and  
2 here on behalf of General Motors, Brian Sieve and Jeff  
3 Daxe, and then Ryan Ingram.

4 MR. SIEVE: Good morning, Your Honor.

5 THE COURT: Good morning.

6 And Mr. Hall.

7 MR. HALL: Yes, Your Honor, John Hall and Walter  
8 Bibbins on behalf of Thornton Chevrolet.

9 THE COURT: Mr. Hall, I don't have an entry of  
10 appearance for you, sir, so I think you need to take care  
11 of that, unless you already have.

12 MR. HALL: My firm filed an amended answer, Your Honor.  
13 But I will certainly make sure that's done.

14 THE COURT: You did file the amended answer?

15 MR. BIBBINS: We did. We filed an amended answer and  
16 an entry of appearance for John Hall, Walter Bibbins --  
17 THE COURT REPORTER: Sir, I can't hear you.

18 THE COURT: Well, I don't have an entry of appearance,  
19 but if you filed a pleading, that's sufficient.

20 MR. BIBBINS: We did, Your Honor.

21 MR. HALL: We'll go ahead and file one, just for the  
22 record, Your Honor, to clean it up.

23 THE COURT: Okay. Thank you.

24 The first order of business is we're serving you today,  
25 my staff attorney Mrs. Rawcliffe is going to serve you,

1 with a notice that this trial -- that this case has been  
2 set for April 11, 2016, beginning at nine o'clock, for  
3 trial. It will continue day-to-day until a verdict is  
4 reached. Also, I've set down a pretrial hearing for that  
5 trial on March 21st, 2016, at 10:30 a.m.

6 And based on those dates, the counsel for all parties  
7 are instructed to submit a Proposed Consent Scheduling  
8 Order by September 30th, with specific deadlines for  
9 enumerated items in the order, and others that may be  
10 needed not limited to those. Thank you.

11 I'm ready to hear your motions, and I would like to  
12 know who's going to speak on behalf of the defendant,  
13 General Motors?

14 MR. INGRAM: Yes, Your Honor, Robert Ingram, on behalf  
15 of General Motors. And what I would like to do is present  
16 my opening argument and, in rebuttal, Mr. Sieve would  
17 respond to anything. My opening is only going to be less  
18 than 10 minutes.

19 THE COURT: Okay.

20 MR. INGRAM: With the Court's permission. Thank you.

21 THE COURT: And who is going to speak on behalf of the  
22 plaintiff?

23 MR. COOPER: I am, Your Honor.

24 THE COURT: Okay. Thank you, Mr. Cooper.

25 You may go ahead, Mr. Ingram.

1 MR. INGRAM: Thank you, Judge. May it please the  
2 Court. Robert Ingram, here on behalf of General Motors,  
3 and joining me today, as we just talked about, is Brian  
4 Sieve and Jeff Daxe.

5 Before beginning argument, I do want to thank the Court  
6 for its willingness to accommodate the parties by being  
7 here, today, on Saturday. I know this is normally your day  
8 off.

9 And last Wednesday, one of the days the Court was  
10 considering scheduling this hearing, I met with auditors at  
11 the State Bar who are doing a -- the Legislature is  
12 auditing the Judiciary. And Judge Darden had given me  
13 information from the Council of Superior [sic] Court Judges  
14 and Judge Staley had given me information from the Council  
15 of Superior Court Judges to give to them in their audit.

16 But it gave me the perfect opportunity to brag on the  
17 Cobb State Court and how hardworking it is, and that the  
18 Court had agreed to schedule this hearing on Saturday so I  
19 could attend that meeting, so I appreciate the Court doing  
20 that.

21 THE COURT: Certainly. A judge always likes to be in  
22 the courtroom.

23 MR. INGRAM: Right. Thank you, Judge.

24 We are here today on the defendant's motion to dismiss.  
25 And as the Court is aware -- Mr. Daxe is handing up a copy

1 of the PowerPoint.

2 As the Court is aware, in June of 2011, the Meltons  
3 filed suit against General Motors. About two years later,  
4 the Meltons executed -- the Meltons and GM agreed to a  
5 settlement agreement and they entered a settlement  
6 agreement. And shortly thereafter, a few days later, the  
7 parties filed a consent motion asking the Court to dismiss  
8 General Motors, and that motion was then entered on  
9 September 16, 2013.

10 They -- this Court entered that consent order  
11 dismissing the case and, as the Court is aware, an order  
12 dismissing a case with prejudice is a final judgment. And  
13 several cases, Supreme Court decisions we cite in our  
14 brief, stand for that, that a dismissal order constitutes a  
15 judgment on the merits for the purpose of res judicata.

16 On May 12, 2014, the plaintiffs filed what I call  
17 Melton II, and, Judge, for purposes of this argument, I'm  
18 going to refer to the first civil action as Melton I, and  
19 the action we are in today, Melton II, which is a separate  
20 civil action.

21 In Melton II, the plaintiffs seek damages for the same  
22 plaintiffs against the same defendants for the same  
23 wrongful death. Melton II asserts the same causes of  
24 action against GM previously raised in Melton I. And in  
25 their complaint, Judge, at page 45, they even refer to

1 their causes of action as renewed claims against GM, so  
2 there's really no dispute on that. The plaintiffs are  
3 bringing in the same causes of action that they had in  
4 Melton I.

5 And the law on res judicata -- I know this Court  
6 routinely has lawyers appear before you and talk about  
7 black letter law, and the black letter law supports my  
8 client's position. And, Judge, sometimes they may have  
9 actual black letter law; sometimes they may be paraphrasing  
10 the law a little bit.

11 In this case, the law that controls this motion is,  
12 literally, black letter law, and it is found in OCGA §  
13 9-12-40: "A judgment of a court of competent jurisdiction  
14 shall be conclusive between the same parties and their  
15 privies as to all matters put in issue, or which under the  
16 rules of law might have been put in issue."

17 And the Supreme Court, in *Lawson v. Watkins*, a case we  
18 cite in our brief, goes even further in interpreting that  
19 statute and says: "One must assert all claims for relief  
20 concerning the same subject matter in one lawsuit, and any  
21 claims for relief concerning that same subject matter which  
22 are not raised, will be res judicata pursuant to the  
23 statute." And the statute goes on to say: "In the cause  
24 where the judgment was rendered until the judgment is  
25 reversed or set aside."



1 There is no dispute that the judgment in Melton I that  
2 was entered by this Court has not been reversed. There is  
3 no dispute that the judgment in Melton I that this Court  
4 entered has not been set aside. The plaintiffs don't even  
5 argue otherwise.

6 There are three prerequisites for the mandatory  
7 conclusive effect for a judgment.

8 The first one, Judge, is identity of the parties;  
9 second, is identity of the causes of action; and, third, is  
10 an adjudication by a court of competent jurisdiction.  
11 There is no dispute that all those conditions are met. The  
12 plaintiffs don't even argue otherwise in their brief.

13 Now, what the plaintiffs do argue in their brief,  
14 Judge, is they argue rescission. Rescission is not  
15 relevant to this motion to dismiss hearing today.

16 The plaintiffs argue that rescission trumps res  
17 judicata, but they cite no cases. Not just -- they don't  
18 cite Georgia cases; they don't cite any case across the  
19 country, because there is none that supports the argument  
20 they are making.

21 The argument is wrong as a matter of law. Once an  
22 action is dismissed with prejudice, any attempt by one  
23 party to the dismissal to litigate the dismissed claim  
24 against the dismissed party under the guise, or under  
25 another guise, is precluded under the doctrine of res

1           judicata.

2           Now, rescission differs from res judicata, and that's  
3           what the plaintiffs are arguing, but the plaintiffs confuse  
4           the issue. The plaintiffs' argument, and, Judge, we cite  
5           the *Jordan v. Jordan* case, a Supreme Court case, and  
6           several other cases in our brief that reject this argument.

7           The plaintiffs' argument -- and here's a case that  
8           explains it perfectly: "Is flawed in that it conflates the  
9           issue of rescinding the settlement agreement with the issue  
10          of rescinding the prior judgment. The analyses of the two  
11          issues are and should remain distinct."

12          And so the plaintiffs' settlement in Melton I involved  
13          two steps. First, the plaintiffs and General Motors  
14          executed a settlement agreement. And, second, this Court,  
15          in Melton I -- not in this case, Melton II -- entered a  
16          final judgment in a separate action dismissing Melton I  
17          with prejudice. And so in order to revive those claims,  
18          Judge, they've got to do two things again, and the law is  
19          clear on it.

20          The first is this Court must set aside its judgment in  
21          Melton I, and they have to take the appropriate steps and  
22          meet the appropriate standards to do that; and, second, the  
23          plaintiffs must rescind the settlement agreement.

24          A dismissal is required by law because the plaintiffs  
25          have failed to address step one, and they ignore it in

1 their briefing. Melton II is barred by res judicata effect  
2 of the Melton I judgment, because it has not been reversed  
3 and it has not been vacated, and because of that, GM's  
4 motion to dismiss should be granted, and we ask the Court  
5 to do so. Thank you.

6 THE COURT: Thank you, Mr. Ingram.

7 MR. COOPER: Thank you, Your Honor. We, too, have a  
8 PowerPoint to assist with the argument.

9 Your Honor, before I address Robert's references to the  
10 motion to dismiss and res judicata, what this is, is a  
11 motion to dismiss under 12(b) (6). And so what they're  
12 saying is we have not stated a claim in our complaint to  
13 the extent that the Court should grant their motion,  
14 because we haven't stated a claim under 12(b) (6).

15 And so we need to look at the complaint, first of all.

16 What did we allege in the complaint? And if you look  
17 at paragraph 16 through 110 of the complaint, we go into  
18 details about GM's concealment of the defects in the key  
19 system from not only the Meltons, but from the public, so  
20 all of the facts within the complaint support our  
21 contention that GM concealed this defect from the Meltons  
22 and the public for over a decade.

23 Those facts are essentially confirmed in the Valukas  
24 report. Your Honor may be aware of the independent report  
25 that GM commissioned. Mr. Valukas -- most of what's in the

1 Valukas report is contained in our complaint. So we have  
2 the underlying concealment, but then we have GM's  
3 fraudulent concealment of evidence from the Meltons in the  
4 Melton case. So there's two distinguishing sets of facts.  
5 One is their underlying conduct while they were  
6 designing, manufacturing, and selling the vehicle before  
7 the Melton case.

8 And then, what did they do in the Melton case to  
9 continue to conceal evidence that they knew about,  
10 fraudulently, and, as a result, caused the Meltons to enter  
11 into this settlement agreement, not knowing all the  
12 information that GM knew? There's a lot of information  
13 about the concealment; I want to focus on a couple.

14 The first is this issue -- and Your Honor may have  
15 already seen this regarding the design of the switch.

16 Our expert, Mark Hood, discovered, in March of 2013,  
17 that GM, or someone, had changed the switch. And that the  
18 switch on the left was Brooke's switch; the switch on the  
19 right is the newer switch, and the switch on the right is  
20 stronger. And if the Court will recall the allegations,  
21 Brooke's key turned off. Her key would not have turned off  
22 had it had the better switch.

23 So we discovered that on our own and bring it to the  
24 attention of Ray DiGiorgio, the lead design engineer. And  
25 here is the switch. This is the basic change in the

1 switch. Here is the spring and the pin in the old switch;  
2 here is the spring and the pin in the new switch. I don't  
3 want to get into all the engineering details, other than to  
4 say the bottom switch is the better switch because it's  
5 harder to turn from run to accessory.

6 So we present this to Mr. DiGiorgio, in Melton I, the  
7 first Melton case, and we --

8 THE COURT: I apologize to interrupt you, but I do want  
9 to make one thing clear.

10 MR. COOPER: Sure.

11 THE COURT: In a motion to dismiss, I can't consider  
12 anything outside the pleadings. And the one thing that I'm  
13 not going to allow happen here is this be converted to a  
14 summary judgment.

15 MR. COOPER: Sure.

16 THE COURT: Okay. So keep that in mind with your  
17 argument, both the defense and the plaintiff.

18 MR. COOPER: And this is in the complaint, as far as  
19 the change in the switch.

20 The DiGiorgio testimony that I'm about to play is in  
21 the complaint. We specifically set out in --

22 THE COURT: You did.

23 MR. COOPER: -- our complaint this specific testimony  
24 that's in paragraphs 111 through 140 of the complaint, so  
25 we're sticking with the allegations in the complaint,

1 because, you're correct, this is the motion to dismiss, not  
2 a motion for summary judgment.

3 So this is Mr. DiGiorgio, the lead design engineer, and  
4 I'll specifically reference the portion of the complaint  
5 that Mr. DiGiorgio is testifying to. It's paragraph 113 of  
6 the complaint.

7 And how do we start this, Bob?

8 THE COURT: Can we move the speaker, real quick?

9 (Video clip is played.)

10 MR. COOPER: And then at page -- in paragraph 114 of  
11 our complaint, Mr. DiGiorgio testifies about taking apart  
12 current switches and determining whether there were any  
13 design changes, and this is the testimony that's referenced  
14 at 114 of the complaint.

15 (Video clip is played.)

16 MR. COOPER: And then at paragraph 115 of the  
17 complaint, we reference Mr. DiGiorgio reiterating he was  
18 not aware of any changes in the ignition switch between '05  
19 and the later-model Cobalts.

20 (Video clip is played.)

21 MR. COOPER: And then in paragraph 116 of our  
22 complaint, it contains testimony about Mr. DiGiorgio  
23 obtaining Cobalt replacement switches directly from the  
24 manufacturer, Delphi, who made the switches.

25 If we can pull that up, Bob?

1 (Video clip is played.)

2 MR. COOPER: And then the next one, also contained in  
3 paragraph 116 of the complaint.

4 (Video clip is played.)

5 MR. COOPER: And then Mr. DiGiorgio, paragraph 117,  
6 provided the following additional testimony about Delphi.

7 (Video clip is played.)

8 MR. COOPER: So Mr. DiGiorgio's testimony, at that  
9 point, Your Honor, in paragraph 118, left no doubt that he  
10 had spoken with Delphi employees and that they confirmed  
11 there were no changes in the switch between '05 and 2010.  
12 That was GM's position at this time.

13 And then he was shown photographs of the changes that  
14 Your Honor -- that I just showed you and this was his  
15 testimony.

16 (Video clip is played.)

17 THE COURT: Can we move to the next?

18 MR. COOPER: Yes, Your Honor, we can move to the next  
19 one. And then one final set of questions, Your Honor.

20 Mr. DiGiorgio was further questioned about his  
21 knowledge of any differences in the switch and he,  
22 basically, testified -- he didn't basically testify -- he  
23 said: I'm not aware of this change.

24 And so we've got a witness, the lead design engineer,  
25 who has been produced to talk about the switch,

1 unequivocally testifying: I'm not aware of the switch.  
2 I've talked to Delphi, they're not aware of that switch  
3 change. I have taken apart the switches, there's no  
4 change.

5 And then he's confronted, and he still says he's not  
6 aware of any change. Then he signs his -- excuse me -- his  
7 deposition errata sheet on May 23, 2013, which is part of  
8 the, again, part of the complaint. He has a month to look  
9 at this and correct any testimony, and he doesn't change  
10 his testimony.

11 As we then say in our complaint -- we further followed  
12 up because we believed GM had information regarding this  
13 change. We sent a document request, which is in the  
14 complaint. GM's response from the outside counsel was:  
15 You need to refer back to Mr. DiGiorgio's testimony; there  
16 was no change that we were aware of.

17 So that's -- that was the procedural posture of the  
18 case in the summer of last year. So we're in a situation,  
19 in August of 2013, we're stymied. There's no doubt we have  
20 a good product liability case against GM. But we're  
21 stymied as to the change. GM's position, essentially, is:  
22 It must have been Delphi because we don't know about any  
23 change.

24 And so we make the decision with the Meltons, with the  
25 trial date looming in October, Your Honor will recall, we



1 settled with General Motors and proceeded against Thornton  
2 Chevrolet.

3 The settlement date, as Mr. Ingram said, was September  
4 9th of 2013, and then the order -- the consent order  
5 dismissing GM was entered in -- there's a settlement  
6 agreement and consent order entered on September 16.

7 Now GM is freed up to investigate, because they've  
8 settled the Melton case and, ultimately, what happens is,  
9 Your Honor, General Motors decides to recall the '05  
10 Cobalts, as we know.

11 Then they issue a subsequent recall, and in the  
12 subsequent recall, they expand the recall. This is all in  
13 the complaint. For the first time in this expanded recall  
14 they say, on April 26, the design engineer responsible for  
15 the switch signed a document approving changes to the  
16 switch proposed by Delphi. We don't know who that person  
17 is at that point.

18 The congressional hearings happen and, sure enough, the  
19 documents released show Mr. DiGiorgio had signed off on the  
20 change, despite all of his previous testimony to the  
21 contrary. So that's where we are at that point.

22 What should we have known before August of last year?  
23 We should have known that GM's lead design engineer had  
24 repeatedly perjured himself. We should have known that  
25 they, in fact, changed the switch years before Brooke's

1 accident, and that they could have changed it in Brooke's  
2 car. We should have had all that information when we went  
3 to trial in October, but we had none of it because of this  
4 concealment.

5 So that's where we find ourselves when we settled the  
6 case, and then we find this information from the  
7 congressional hearings. So that's the position that the  
8 Meltons are in at that time.

9 They authorize me, on April 11, 2014, to send this  
10 letter of rescission, pursuant to OCGA § 13-4-60. We  
11 followed the letter of the statute. We tendered the money  
12 back.

13 General Motors sends a response on April 19th, 2014,  
14 and, again, this is in the complaint, where they basically  
15 say: Not only are we not taking the money, but we did  
16 nothing wrong in the underlying case.

17 Then they removed the case, and now we're back here --  
18 the court remands the case, and we're back here before this  
19 Court, and then they immediately file this motion to  
20 dismiss arguing res judicata, res judicata -- that's  
21 essentially what their argument is.

22 Our response to that is, first of all, our complaint is  
23 sufficient. We pled rescission, and as we say in our  
24 responsive brief, the rescission precludes res judicata.  
25 Our rescission is permitted by statute, and as we say in

1 the brief, under the *Morris versus Cowart* case, 281 Ga.  
2 App. 288, the rescission is to restore us to the status  
3 quo. In other words, put us back where we were before the  
4 settlement was entered.

5 We have additional case law in our brief. I'm not  
6 going to -- Your Honor, I'm sure, has read it. We've  
7 alleged fraud. We've alleged that we were fraudulently  
8 induced into settlement -- into making the settlement and,  
9 therefore, we have adequately pled rescission, and so the  
10 motion should be denied.

11 And GM has been put on notice of the claim against it.  
12 We're alleging fraud. We're alleging it should have been--  
13 that should have been disclosed, and we're alleging,  
14 properly, rescission.

15 Now, Mr. Ingram says we must rescind or, I guess, move  
16 to set aside the judgment and then rescind, or rescind and  
17 then move to set aside the judgment. That is not the law.

18 Your Honor, the *Jordan versus Jordan* case that GM cites  
19 is correct, and that is -- and they cite it correctly, and  
20 that is when a settlement agreement is incorporated into a  
21 judgment, like in a domestic case, where the judgment  
22 actually incorporates and refers to the settlement  
23 agreement, in those circumstances because the settlement  
24 agreement is part of the judgment, you have to move to set  
25 aside the judgment. That's hornbook black letter law.

1 In this case, as Your Honor was aware -- Your Honor is  
2 aware, excuse me. This was a private agreement between  
3 General Motors and the Meltons. Your Honor never saw it.  
4 Your Honor, it was confidential; no one saw it, but us and  
5 the Meltons. It wasn't a part of any judgment. There was  
6 no judgment entered on the settlement agreement by Your  
7 Honor.

8 Your Honor simply -- we had to when we -- the reason we  
9 had to get the consent order, as Your Honor is aware, is we  
10 had to get the consent order in order to get Thornton to  
11 agree to the dismissal, because they were a co-defendant,  
12 and that needed to be through a consent order. So that was  
13 the vehicle by which GM was dismissed procedurally. But  
14 the settlement agreement was totally -- it was a private  
15 agreement between the parties.

16 I would submit that if we had filed a motion to set  
17 aside the judgment, if we hadn't filed this new action, we  
18 would be before Your Honor and they would be saying: This  
19 isn't the right way to go about it. You've got to rescind.  
20 You don't move to set aside the judgment, because the Court  
21 never entered a judgment.

22 And so we contend under the law we have, in fact,  
23 properly pled rescission, and the motion should be denied.

24 Now, this case, as I said a moment ago, is in a proper  
25 procedural posture. And what I mean by that is, it's teed-

1 up. GM knows what our allegations are. They are properly  
2 pled in the complaint. Did they mislead the Meltons, did  
3 they fraudulently conceal evidence, and did this fraud  
4 result in the settlement. That's all in the complaint.

5 GM wants to focus on form over substance. They want  
6 Melton to jump through the motion to set aside hoop, and  
7 then jump through the rescission hoop, which is just wrong  
8 under the law.

9 But, the Court -- Your Honor could still treat this,  
10 either now or in the future, if you -- if it was determined  
11 that we should have filed a motion to set aside, the Court  
12 could treat this as the motion to set aside because they're  
13 on notice. It's fraud. We're just alleging fraud.

14 We're not saying you need to do that, but if, for some  
15 reason, Your Honor were to determine, well, I think that  
16 the plaintiffs should have moved to set this aside, there's  
17 a case that we have called *Herringdine*, H-e-r-r-i-n-g-d-i-  
18 n-e (spelling) *versus* *Walley*, 238 Ga.App. 210, and in that  
19 case it was somewhat similar to this case.

20 And that is, in that case, there was actually a verdict  
21 and judgment entered against the defendant. And the  
22 defendant filed a new lawsuit and moved to set aside the  
23 judgment within the time he was permitted to do that, and  
24 the respondent to the motion, said: No, no, you can't do  
25 that. When you are moving to set aside, you have to file a

1 motion in the same case.

2 And this is the court's response to that, at page one  
3 of the opinion -- excuse me, at page 210 of the opinion:

4 "Under the Civil Practice Act, liberal pleadings and  
5 procedure are mandated. Cases should be decided on the  
6 merits rather than on procedural technicalities. The rules  
7 set forth in the Act are intended to promote and not to  
8 obstruct the administration of justice, and thus enable the  
9 court to do substantial justice rather than to decide cases  
10 upon technicalities, which have no relationship whatever to  
11 the rights of the parties to the litigations. Cases are  
12 not to be dismissed, except where it appears beyond doubt  
13 that the party can prove no set of facts to support the  
14 relief sought. All pleadings shall be construed as to do  
15 substantial justice. The title applied to the pleadings is  
16 not binding on the court, where justice requires the court  
17 to treat pleadings as if there had been a proper  
18 designation."

19 And, in other words, the court here decided, even  
20 though you filed a new lawsuit, it is technically not a  
21 motion to set aside. Everyone knows what this is. You're  
22 trying to get the judgment overturned in that case.

23 Again, we don't have the judgment like that, but even  
24 if the Court were to determine we did, that would be the  
25 appropriate procedural remedy, would be either to convert

1 this into a motion to set aside the judgment, or, the Court  
2 already has entered -- has this order entered regarding the  
3 trial date, we could come back and argue the motion to set  
4 aside the judgment 30 days from now, and it would be the  
5 exact same argument that we've proved fraud.

6 So we would submit that we didn't need to do that,  
7 anyway, but in the event that the Court thought that we  
8 needed to file a motion to set aside the judgment, and  
9 since it's teed-up anyway, we should be able to proceed.

10 And so, in summary, there are sufficient allegations in  
11 the complaint to support our claim for rescission, the  
12 complaint puts GM on notice, and we would respectfully  
13 submit that the Court should deny the motion to dismiss.  
14 Thank you.

15 THE COURT: Thank you.

16 Mr. Sieve?

17 MR. SIEVE: Thank you, Your Honor.

18 THE COURT: Can you speak from the podium?

19 MR. SIEVE: Yes, Your Honor, I'm headed over there.

20 THE COURT: Thank you.

21 MR. SIEVE: Good morning, Your Honor. Brian Sieve, on  
22 behalf of General Motors. Thank you for accommodating us  
23 this morning.

24 Let me start with Mr. Cooper's last argument, which is  
25 just converting this to a motion under OCGA § 9-11-60, and

1 I would submit to Your Honor that that is not procedurally  
2 proper.

3 What 9-11-60 says, first of all, in subsection (F), is  
4 that reasonable notice must be provided of any motion to  
5 set aside or vacate; and, second, and more importantly, the  
6 plaintiffs have a standard, an evidentiary standard, they  
7 must meet before we even have to respond.

8 Under 9-11-60, they have to show that they meet one of  
9 the provisions of the section for setting aside a judgment,  
10 which, I assume from Mr. Cooper's argument, is going to be  
11 fraud. But they have to make an evidentiary showing of  
12 that. They can't just come in off complaint allegations,  
13 they have to submit evidence on that, and we have an  
14 opportunity to respond, and the Court can determine whether  
15 or not it wants to have a hearing on that.

16 But it would not be appropriate to simply convert what  
17 is a motion to dismiss into a motion under 9-11-60. I  
18 would suggest that Mr. Cooper's suggestion that you do that  
19 is an implicit admission that he knows that, in fact, he  
20 has to proceed under 9-11-60 before he can pursue this case  
21 in Melton II. And that's because that's exactly what the  
22 law is, Your Honor.

23 THE COURT: Well --

24 MR. SIEVE: All of the -- yes?

25 THE Court: Well, I was going to ask some questions,



1 but since you're doing follow-up, I'm going to go ahead and  
2 ask the questions.

3 MR. SIEVE: Sure.

4 THE COURT: I'm not sure what your basis for that  
5 position is, because he has cited case law and there is  
6 other case law, *Manley versus Jones*, in Georgia, that a  
7 complaint which refers to fraud in a prior judgment can  
8 then be viewed as a motion to set aside the judgment.

9 MR. SIEVE: Well, even if, Your Honor, my point is, is  
10 that if he's going to convert this into an motion under  
11 9-11-60, and I've got the statute in front of me, it says  
12 that he has to make an evidentiary showing -- this is under  
13 (d) (2). He has to show fraud, accident, or mistake, or the  
14 acts of the adverse party unmixed with the negligence or  
15 fault of the movant. So that's the first thing. Complaint  
16 allegations do not show fraud, accident, or mistake. Those  
17 are just allegations.

18 There's been no evidence submitted to Your Honor from  
19 which you could conclude that there's an evidentiary basis  
20 for setting aside the verdict under 9-11-60 and, more  
21 importantly --

22 THE COURT: Well, why didn't the trial courts, in the  
23 cases that took this position, and the appellate courts who  
24 affirmed the trial courts who took that position, view it  
25 that way?

1 MR. SIEVE: Well, Your Honor, I'm not sure exactly --  
2 THE COURT: Because they viewed it as the substance and  
3 function of the pleadings were determinative and required  
4 that the trial court deal with the complaint, as it  
5 contained a motion to set aside the judgment as well.

6 MR. SIEVE: Well, Your Honor, I'm not sure what case,  
7 because I didn't -- the case that Mr. Cooper cited is the  
8 first I've heard of that. I'm happy to go look --

9 THE COURT: It's *Manley versus Jones*, 203 Ga.App. 173,  
10 deals with that as well. And that was where a suit was  
11 filed in probate court, and then a second suit was filed  
12 alleging fraud or issues related to fraud, and the trial  
13 court determined that the efforts of the party bringing the  
14 suit were to set aside the judgment of the probate court.  
15 And then because the substance and functions of the  
16 pleadings were determinative, the court must deal with the  
17 complaint as a motion to set aside the judgment.

18 MR. SIEVE: Well, if that's the case, Your Honor, you  
19 have no response from General Motors in front of you. You  
20 have no answer in which we have been able to submit any  
21 evidence.

22 You have an answer, but you don't have an opportunity  
23 for us to submit evidence to respond to the allegations  
24 that Mr. Cooper has made in his complaint. And so we  
25 haven't had an opportunity to respond with any evidence to

1 the allegations that he has made in the complaint.

2 All you have is our answer in front of you and so  
3 that's not sufficient, from an evidentiary standpoint, from  
4 which the Court could conclude that there's the basis of  
5 there's been fraud, and I would submit, Your Honor, under--  
6 THE COURT: Well, in that position, then, you're ahead  
7 of the game. If you want to take that position, then  
8 you're too soon, because you're on a motion to dismiss.

9 MR. SIEVE: Right. And the proper procedural approach,  
10 Your Honor, is to dismiss this action, and if Mr. Cooper  
11 wants to file a motion under 9-11-60 making an evidentiary  
12 showing, not just complaint allegations, we can then  
13 respond to that, and then the Court can make a  
14 determination as to whether there is an evidentiary basis  
15 to set aside the judgment.

16 But, Your Honor, I would submit I'm not aware of any  
17 case in which the court has set aside a judgment based on a  
18 complaint and an answer. I'm not aware of any case, and so  
19 I'm happy to look for it, but I'm not aware of any.

20 But as a matter of law, Your Honor, what the courts in  
21 Georgia have said is that res judicata is something that  
22 this Court can determine on a motion to dismiss when the  
23 facts are uncontroverted. And it's uncontroverted.

24 THE COURT: All right, well, then, deal with the  
25 rescission. How do I give effect to plain law in Georgia

1 of rescission?

2 MR. SIEVE: Two separate issues, Your Honor. The issue  
3 of whether Mr. Cooper has rescinded the settlement  
4 agreement.

5 THE COURT: Well, we can move on. That's the second  
6 issue. So how do I give effect to the --

7 MR. SIEVE: Well, that's going --

8 THE COURT: -- rescission?

9 MR. SIEVE: -- to be, ultimately, that's going to be a  
10 jury issue, Your Honor, for the jury to decide whether or  
11 not there has been any fraud that gives rise to a right to  
12 rescind; and, secondly, whether or not Mr. Cooper has, in  
13 fact, made a proper tender that supports rescission.

14 I mean, we -- one of the things we -- and it's not ripe  
15 for today. But I would point out to Your Honor, is we  
16 dispute that, in fact, he made a proper tender because he  
17 did not offer to tender back the entire settlement amount.  
18 He only offered to tender back whatever he could reasonably  
19 tender. He didn't even identify what that dollar amount  
20 was.

21 So it appeared that he was taking the position that his  
22 clients could keep up part of the settlement amount and  
23 still proceed with rescission. But that is a factual issue  
24 ultimately for the jury to decide, Your Honor, once we get  
25 past this initial issue of whether or not he can even bring

1 a second suit.

2 The first issue for Your Honor is a pure legal issue.

3 It's a straightforward legal issue.

4 THE COURT: You're avoiding the answer -- the question,  
5 Mr. Sieve. Because if you're going to have rescission, and  
6 you had circumstances that flow from a contract such as a  
7 settlement agreement, a dismissal, whatever, whatever  
8 occurred after that contract, and then you have rescission,  
9 how can I give effect to that?

10 MR. SIEVE: Because, Your Honor, the issue of whether  
11 or not the settlement agreement is rescinded is different  
12 than the issue of whether or not there is a basis for  
13 vacating the Court's dismissal order.

14 Those -- whether the settlement agreement is rescinded,  
15 even if you assume for purposes of the argument, that  
16 there's been improper rescission, that does not allow a  
17 party to ignore a court judgment. And think about the  
18 random --

19 THE COURT: Well, let's just do it this way. You tell  
20 me how we would have gone about doing this.

21 MR. SIEVE: Okay.

22 THE COURT: How should the plaintiff have gone about  
23 doing all of this? Assuming that they have grounds for  
24 what they're attempting to do and that you would dispute  
25 those.

1 MR. SIEVE: Right.

2 THE COURT: How would you --

3 MR. SIEVE: It is actually pretty straightforward, Your  
4 Honor.

5 THE COURT: Okay.

6 MR. SIEVE: Mr. Cooper would have tried to rescind,  
7 as he did, and, ultimately, there will be a jury issue  
8 about whether that he's done that properly. And he would  
9 have filed a motion before Your Honor, under 9-11-60,  
10 recognizing that there's a court judgment that precludes  
11 him from filing a second lawsuit. He would have asked you  
12 to set aside the judgment in Melton I. If Your Honor had  
13 done that, he could then file his new complaint in Melton  
14 II. The problem is, he's gone backwards. He filed Melton  
15 II before he came in and got relief from the court  
16 judgment. And so we didn't have an opportunity to respond  
17 to that. And this is not -- I don't want to suggest to  
18 Your Honor that this is some academic exercise. It's not.  
19 I mean --

20 THE COURT: It seems to be.

21 MR. SIEVE: But, well, I would submit, you know,  
22 respectfully, Your Honor, it isn't.

23 I mean, we should have an opportunity to present  
24 evidence and arguments as to whether or not there's a  
25 ground for vacating the judgment under 9-11-60. And

1 there's a lot of case law, Your Honor, that says he has to  
2 meet a high evidentiary burden, clear and convincing when  
3 you're alleging fraud, and that it's not just any fraud  
4 that gives rise to a right to vacate the judgment. And so  
5 we should have an opportunity to respond to that,  
6 procedurally, under 9-11-60.

7 THE COURT: And how are you prevented from doing that?

8 MR. SIEVE: Well, there is no 9-11-60 motion filed,  
9 Your Honor.

10 THE COURT: What if the Court considers the complaint a  
11 motion to set aside? How are you prevented from --

12 MR. SIEVE: Well, then --

13 THE COURT: -- responding?

14 MR. SIEVE: -- I would go back and we would make a  
15 filing and we would, presumably, want to submit affidavits  
16 and evidence to address the issues raised by the motion.

17 THE COURT: Right. Nobody has prevented GM from doing  
18 that.

19 MR. SIEVE: But, Your Honor, we had no notice that the  
20 Court was converting it into a 9-11-60. I mean, that's  
21 what -- that's what 9-11-60(F) says: Reasonable notice  
22 must be afforded to the parties on all motions.

23 Excuse me, Your Honor.

24 THE COURT: Well, what if you get reasonable notice  
25 today?

1 MR. SIEVE: As to when we could respond, Your Honor?  
2 THE COURT: Reasonable notice that the Court, let's  
3 say, for example, that -- reasonable notice that the  
4 Court's going to consider, as the appellate cases support,  
5 the complaint as a motion to set aside the judgment.

6 If that is such a problem with the complaint, then I  
7 could give you notice today that I'm going to consider it  
8 as a motion to set aside the judgment.

9 MR. SIEVE: You could. I would respectfully -- you  
10 could. I agree with that.

11 THE COURT: Well, I'm glad you --

12 MR. SIEVE: I respectfully --

13 THE COURT: I'm glad you appreciate the power of the  
14 Court.

15 MR. SIEVE: I do. Okay. I would respectfully request,  
16 though, that Mr. Cooper file a proper 9-11-60, with an  
17 evidentiary basis for that, rather than just complaint  
18 allegations. But if Your Honor is not -- we think that's  
19 the appropriate procedural step.

20 But if Your Honor's not going to make him do that, then  
21 I would ask for something on the order of 30 days in order  
22 to make a response, with whatever evidentiary submission we  
23 choose to make to that, and then Your Honor can hold a  
24 hearing on that motion.

25 THE COURT: And that would be fine. I think all of



1 that is -- goes without saying, that all that would be  
2 possible.

3 That's why I feel like that making the argument that  
4 the judgment, a dismissal with prejudice, that was filed  
5 because a settlement was reached, would keep this case from  
6 going forward because of res judicata. I don't see that.

7 MR. SIEVE: Well, Your Honor, I understand your  
8 position on that. I would --

9 THE COURT: Well, the other problem that you deal with,  
10 besides the motion to set aside the judgment, is a factor  
11 in res judicata, is that the case that is to have the  
12 effect of res judicata must be one in which a full and fair  
13 opportunity to litigate the issues was made.

14 And, in this instance, if the allegations of the  
15 complaint are taken, in view of that requirement, I think  
16 the plaintiffs' position is that there was not full and  
17 fair opportunity to litigate.

18 MR. SIEVE: Well, Your Honor, I would --

19 THE COURT: And then --

20 MR. SIEVE: I'm sorry.

21 THE COURT -- moreover, the second subject of fraud, not  
22 the first, but the second subject of fraud, would make this  
23 case one in which it's not the same. It's not the same  
24 issues between the same parties.

25 MR. SIEVE: I'm not sure --

1 THE COURT: How does the Court deal with that?  
2 MR. SIEVE: Well, I'm not sure what you're referring to  
3 by the second subject of the fraud.

4 THE COURT: Well, the first subject of fraud has to do  
5 with the design. The second complaint has an additional  
6 allegation of fraud, with regard to concealment and induce  
7 to settle.

8 MR. SIEVE: Well --

9 THE COURT: So that's a second subject of fraud. And  
10 that was not in the first suit and, in fact, I think your  
11 pleadings suggest -- or your response suggested that the  
12 Meltons should have known that.

13 MR. SIEVE: Well, Your Honor, as I read the complaint,  
14 the fraudulent concealment claim alleged in count four is  
15 really duplicative of the first three claims. It's  
16 alleging a failure to disclose a defect or a failure to  
17 recall. It doesn't allege anything outside of the original  
18 claims, so as I read the complaint --

19 THE COURT: Well, how do you see the original claims?

20 MR. SIEVE: The original claims allege a product  
21 liability case with respect to the underlying vehicle, and  
22 so the fraudulent concealment count, as I read it in count  
23 four, was simply that you failed to disclose a defect,  
24 which Mr. Cooper claims General Motors was aware of and  
25 should have disclosed earlier. So, to me, as I read that,

1 those are all part of the same count.

2 Those are claims that could've been brought in Melton  
3 I, that's what res judicata is. Any claims that were  
4 asserted or could have been asserted are barred by res  
5 judicata, and those are certainly claims, as he  
6 acknowledges, because he pleads them as renewed claims that  
7 could have been brought.

8 THE COURT: How could he have known? Mary Barra didn't  
9 know. How's he going to know?

10 MR. SIEVE: Well, he alleges that --

11 THE COURT: The CEO of GM testified in front of  
12 Congress that she didn't know. Are you going to hold the  
13 Meltons to a higher standard than GM?

14 MR. SIEVE: Your Honor, all I'm saying is those are  
15 claims that Mr. Cooper alleges were renewed and are based  
16 on the same conduct. I'm not --

17 THE COURT: I don't believe his complaint sets that out  
18 that way.

19 MR. SIEVE: Okay.

20 THE COURT: And I don't think that you or Mr. Ingram,  
21 honestly, read it that way.

22 MR. SIEVE: Well, that -- okay. Well, if that's the  
23 way Your Honor -- as I understood what he was alleging, is  
24 that those were claims that were renewed claims that  
25 could've been brought in Melton I, that's what he said.

1 THE COURT: The only way he could have brought those  
2 claims in the first lawsuit, is to have known something  
3 that the executives at GM claim they didn't know. I mean,  
4 that's simple. I can't see it any other way.

5 I hate putting you on the hot seat, but both sides  
6 argued, so then I thought I would get in with the  
7 questions.

8 MR. SIEVE: That's fine, I can take it.

9 THE COURT: I don't think they would bring you from  
10 Chicago if you couldn't take it.

11 MR. SIEVE: Well, Your Honor, it sounds as if you're  
12 inclined to treat this as a 9-11-60 motion, if I'm reading  
13 your body language correctly.

14 THE COURT: Well, I think that the Court appreciates  
15 your arguments, and I have studied them at great length and  
16 prepared very hard for this hearing, and I see where  
17 there's a -- I don't know what the right word would be.

18 There's conflict among all these legal issues, or  
19 overlapping, and how do you apply them, and I appreciate  
20 the position you tried to take.

21 But I think to give effect to the law and the public  
22 policy that that law is trying to promote, would be to put  
23 the parties back where they originally were, and that all  
24 has to be played out properly. But I don't think, at this  
25 stage, a motion to dismiss can be granted on res judicata.

1 MR. SIEVE: Would -- would you --- are you going to  
2 procedurally --

3 THE COURT: So, procedurally, then, the Court would  
4 view it as if you -- if GM thinks that a motion to set  
5 aside the judgment is necessary, then the Court will state  
6 that, based on the substance and function of the pleadings  
7 of the plaintiffs, they have made an effort to set aside  
8 the judgment and that, at your request, I will order that  
9 they more formally set out that motion.

10 MR. SIEVE: Thank you, Your Honor.

11 THE COURT: And we would have the time to respond to  
12 that.

13 MR. SIEVE: I appreciate that.

14 THE COURT: Fully.

15 MR. SIEVE: Thank you. Do you want to set a schedule  
16 now, or do you want us to, I mean, try to agree on one --

17 THE COURT: Well, you've already got a lot of things to  
18 schedule.

19 MR. SIEVE: Yeah.

20 THE COURT: This is a big case and I've decided that we  
21 need to give it the attention it deserves, and I went ahead  
22 and made the effort to find a date in 2016, and I'm ready  
23 to try it sooner, but I don't know that y'all can get it  
24 sooner, but I'm ready to try it sooner, if we have to try  
25 it.

1 Of course, anything I have set down would go away, if  
2 it were to be dismissed by the Court or by the parties.

3 MR. SIEVE: Understood.

4 THE COURT: That doesn't predetermine those issues.

5 MR. SIEVE: Well --

6 THE COURT: And I don't want to suggest that either.

7 MR. SIEVE: Would you like us to discuss a briefing  
8 schedule with Mr. Cooper on the 9-11-60 motion?

9 THE COURT: That would be fine.

10 MR. HALL: Excuse me, Your Honor. If this is going to  
11 transfer into a 9-11-60 motion, is that going to go under  
12 the previous cause of action, which is where it would be  
13 appropriate? We just need -- if there is going to be an  
14 order or a judgment, an understanding of where that order--  
15 what case that order is going to follow it in.

16 MR. SIEVE: That's, I think, procedurally, where it  
17 needs to go, Your Honor.

18 THE COURT: I don't know that it, technically, has to  
19 be there, Mr. Hall. Based on these other cases where they  
20 proceeded to deal with the issues, it wasn't even in the  
21 same court. The *Manley* case was probate court and superior  
22 court.

23 MR. HALL: I understand, Your Honor. We, just for  
24 purposes of procedure -- and filing a lawsuit requires that  
25 it be done in the appropriate place at the appropriate

1 time. And if we're going to respond, which we, as a  
2 defendant in this case, would be involved in the decision  
3 of whether this case goes forward in this Court, or not,  
4 and under this cause of action or the previous cause of  
5 action. We just want some clarity of that, so that we can  
6 file the appropriate motions that then become applicable to  
7 us, based upon the Court's transfer of this from a motion  
8 to dismiss into a motion to set aside judgment.

9 THE COURT: I haven't transferred this from a motion to  
10 dismiss to a motion to set aside judgment.

11 MR. HALL: I'm sorry, Your Honor. I thought you were  
12 going to treat the complaint as a --

13 THE COURT: That is not transferring a motion to  
14 dismiss to a motion to set aside judgment.

15 MR. HALL: Well, it's transferring the complaint in  
16 that action, instead of a complaint setting forth a new  
17 lawsuit requiring the procedures be met for a new lawsuit,  
18 it's making that complaint a motion to set aside judgment,  
19 and that's the clarification we need.

20 THE COURT: The case law supports this Court looking at  
21 the complaint as also being a motion to set aside judgment.

22 MR. HALL: But it has --

23 THE COURT: So the complaint doesn't go away.

24 Mr. Hall: It has to be within an appropriate civil  
25 action, and if it's a motion to set aside judgment, it is

1 not a new civil action.

2 THE COURT: Mr. Cooper, how do you want to proceed?

3 MR. COOPER: Your Honor, the case, the *Herringdine* case  
4 I referred to, and then the *Manley v. Jones* case which is  
5 cited within the *Herringdine* case, the courts approve of  
6 the case going forward, even if it's treated as a motion to  
7 set aside judgment in the pending case.

8 I mean, I haven't looked at it in that great a detail,  
9 but that seems to me what the courts do, is they put  
10 substance over form and, it's our view here, and you pled  
11 it properly, you can move forward. And *Manley* is -- the  
12 court referenced in *Herringdine* that's -- that appears the  
13 way -- it appears to be the way they proceeded, was just in  
14 the new action, although it was --

15 THE COURT: Yes, it didn't go back to the old action,  
16 Mr. Hall.

17 Because the *Manley* case was determined by a superior  
18 court judge and was affirmed by the appellate court, and  
19 the judgment that was being ignored, or not looked at, was  
20 the probate court judgment, I believe. I don't have the  
21 facts right in front of me at the moment, but that's my --  
22 the Court's recollection, and in Mr. Cooper's example --  
23 which I did not look at the *Herringdine* case, but I could  
24 pull it up.

25 The original judgment was in what court, Mr. Cooper, do



1 you recall?

2 MR. COOPER: The original judgment was in the State  
3 Court --

4 THE COURT: 238 Georgia Appeals --

5 MR. COOPER: -- of DeKalb County --

6 THE COURT: -- 210.

7 MR. COOPER: 238 Appeals 210. And the subsequent case  
8 was filed -- I don't have it in the opinion here. I can't  
9 tell.

10 THE COURT: Do you have the opinion there?

11 MR. COOPER: Excuse me?

12 THE COURT: Do you have the opinion in front of you?

13 MR. COOPER: Yes, Your Honor. But, for some reason --  
14 this is a Fastcase cite and I don't have, in this  
15 particular copy, the -- where the second case was filed.

16 MR. SIEVE: Your Honor, I think, under 9-11-60(b), it  
17 says the judgments may be attacked by motion only in the  
18 court of rendition. And so, as I understood it, the motion  
19 under 9-11-60 would have to be filed in Melton I.

20 Now, obviously, here, Your Honor, it's the same judge,  
21 so I'm not sure that makes a big difference. But,  
22 procedurally, as I understand it, under 9-11-60(b), it has  
23 to be filed in the court of rendition, which is Melton I.

24 THE COURT: I think the *Herringdine* case looks as  
25 though it was in the same court.

1 I'm going to give it some thought. I do not think that  
2 it, procedurally, has to go back to the original case; my  
3 first thought is that.

4 And I'm not entirely certain, Mr. Sieve, in all due  
5 respect, that the Court can't deal with issues as to  
6 setting aside that prior judgment in this particular case,  
7 and on the record before it, as opposed to receiving new  
8 evidence. So I'm going to make that determination.

9 So if you want to present or have evidence, have an  
10 evidentiary hearing, it's probably going to be in this  
11 case, but I'm just saying the position I think I see where  
12 we are, at this point, but I'll enter an order after I  
13 review everything.

14 MR. SIEVE: Okay. Your Honor, just so I understand,  
15 are you still -- are we still in the position where  
16 Mr. Cooper's going to make a formal motion under 9-11-60?

17 THE COURT: No. Mr. Hall just talked me out of that.

18 MR. INGRAM: And did I understand, Judge, that you're  
19 denying the defendant's motion to dismiss, or are you going  
20 to look at that further?

21 THE COURT: I am, in all likelihood, denying the  
22 defendant's motion to dismiss based on res judicata, yes,  
23 if that's your question. Because I think that the  
24 plaintiffs' complaint sufficiently defeats it. And I don't  
25 think that it has to have -- my thought, at this point, is

1 that it has to be beyond the record, because your motion to  
2 dismiss is based solely on the record.

3 So if you were basing your res judicata on failure to  
4 set aside that prior judgment, then, yes, I'm denying it.  
5 Because notice pleading defeats that motion to dismiss.

6 MR. SIEVE: Your Honor --

7 THE COURT: That doesn't forgo you from -- from GM  
8 taking some other position in your -- in a motion requiring  
9 evidence, if that makes sense.

10 And were there any other grounds particularly separate  
11 from the res judicata that you are proceeding on?

12 MR. SIEVE: No, Your Honor.

13 THE COURT: Okay.

14 MR. SIEVE: That was the only ground.

15 THE COURT: Then that would be denied.

16 MR. SIEVE: Okay. If I could just clarify, Your Honor.  
17 Because as I said, we do want an opportunity to respond if,  
18 either if the plaintiffs' going to make a new 9-11-60  
19 submission, which I would, again, ask Your Honor to do.

20 THE COURT: I don't think it's necessary, Mr. Sieve.  
21 Because the point is, is that our focus is not on the  
22 judgment. Our focus now is on dealing with the rescission.

23 MR. SIEVE: Okay. Well, Your Honor, with that score,  
24 I'd like an opportunity, if we could, to respond to what is  
25 now going to be treated as a 9-11-60 motion.

1 We haven't had an opportunity to respond, to even  
2 address the legal standard applicable to that, right, I  
3 mean, there's been no -- there's been no discussion of  
4 whether there has been a showing of whether they have met  
5 the applicable legal standard or -- we haven't had an  
6 opportunity to respond to that at all.

7 So I'd like an opportunity, if you could, Your Honor,  
8 to give us a briefing schedule on that, so we can decide  
9 what kind of submission we want to make.

10 (Brief pause.)

11 THE COURT: The fact that the Court can consider the  
12 complaint as a motion to set aside a judgment, in the  
13 Court's mind, defeats your motion for res judicata on a  
14 technicality.

15 However, the fact that I can view it as a motion to set  
16 aside judgment does not mean that, in this instance and in  
17 this case, I have to view it as the motion to set aside the  
18 judgment. And on the basis of the OCGA § 13-4-60, your  
19 rescission statute, the rescission puts the parties back to  
20 their original status. They cannot remain where they are;  
21 they must go back to before the contract was entered into.  
22 So the original status must be restored.

23 For the original status to be restored, everything  
24 falls like dominoes if they are able to get a jury to see  
25 that there's rescission, so that's grounds for denying your

1 motion to dismiss as well.

2 So we really don't have to go down the road for the  
3 motion to aside judgment, and our focus should be on  
4 proceeding on the rescission and the fraud in the original  
5 case -- the new fraud in the original case.

6 MR. SIEVE: Okay, Your Honor, just so I understand  
7 then. You're not converting it to a 9-11-60 motion?

8 THE COURT: Not technically. I'm just telling you,  
9 that because the complaint can be viewed as requesting the  
10 judgment be set aside, it defeats your motion to dismiss.  
11 But what else defeats your motion to dismiss is the law on  
12 rescission.

13 You could not have rescission -- you can't take the  
14 parties here back to the original path they walked without  
15 defeating the settlement agreement and what came from the  
16 settlement agreement, which was a dismissal.

17 MR. SIEVE: Your Honor, if I may, if that were the law,  
18 then every time a party was unhappy with a settlement  
19 agreement after a court had entered a dismissal order, they  
20 could just purport to rescind the settlement agreement and  
21 file a new lawsuit.

22 Court judgments in Georgia would have no permanent  
23 affect at all. A party could just ignore a court judgment  
24 or vacate it at its own will, and that's exactly what 9-12-  
25 40 says you can't do. And that's why we have to file a

1 motion under 9-11-60 because we have to respect Your  
2 Honor's authority when it dismissed the first case with  
3 prejudice. I'm not aware of any --

4 THE COURT: The rescission law, Mr. Sieve, contemplates  
5 a remedy for both you and the defendant. The fraud remains  
6 in dispute. But the reasonable approach is to return both  
7 parties to where they were, on either side of that  
8 underlying dispute, prior to settlement. And then you are  
9 free to litigate both the prior claim and the alleged  
10 fraud.

11 MR. SIEVE: Okay. I understand Your Honor's ruling. I  
12 just want to -- that the motion to dismiss is being denied.  
13 And I believe I understand. I just want to confirm that  
14 you're not converting it to a 9-11-60, nor requiring that  
15 the plaintiff set aside the original judgment.

16 THE COURT: That's correct.

17 MR. SIEVE: Okay. Okay.

18 THE COURT: Otherwise, you can't give effect to  
19 rescission.

20 And you're absolutely correct, that every plaintiff  
21 could sue on every settlement agreement and allege fraud,  
22 but I think why they don't is they don't have fraud and  
23 they are happy with their deal. We're plowing new ground,  
24 and I understand that.

25 MR. SIEVE: Okay.

1 THE COURT: And there are overlapping concepts and  
2 issues, and I have taken the one that I think is paramount  
3 and overrules the others. And so if a rescission

4 aggregates the contract, then everything falls after that.  
5 MR. INGRAM: Judge, since we are plowing new ground and  
6 this is a dispositive motion, would the Court consider  
7 granting a Certificate of Immediate Review?

8 THE COURT: Respectfully, no.

9 MR. SIEVE: Can we submit a motion on that? Or does  
10 it -- for the record?

11 THE COURT: It won't do any good for you.

12 MR. SIEVE: Okay.

13 THE COURT: You can do it all you want.

14 MR. SIEVE: I just wanted to make sure the record was  
15 clear, that we had formally moved for --

16 THE COURT: The record is clear. You've got a court  
17 reporter.

18 MR. SIEVE: Okay.

19 THE COURT: You moved for a certificate; I denied it.

20 MR. SIEVE: Thank you. Anything else, Your Honor?

21 THE COURT: Do you have any questions?

22 MR. COOPER: The only question now, Your Honor, is  
23 discovery and how it moves forward. We served our original  
24 discovery three months ago. They improperly removed us.  
25 We're now three months delayed in discovery.

1 We would respectfully request, and particularly since  
2 they've already gathered all these documents for Mr.  
3 Valukas and for Congress, that they respond to our  
4 discovery within 10 days from today. That gives them  
5 sufficient time to -- I think there were only 20 or 30  
6 requests and --

7 THE COURT: The deadline -- when was the deadline?

8 MR. SIEVE: And the --

9 MR. COOPER: Technically, the motion to dismiss, as the  
10 Court is aware under that statute that was enacted a few  
11 years ago, stayed discovery until a decision on the motion  
12 to dismiss was made. But, you know, given the  
13 circumstances and the -- the three month delay, and the  
14 fact that they've already gathered these documents for  
15 other parties, we would request that -- that they respond  
16 to discovery within 10 days, given the circumstances.

17 THE COURT: What was the date of the complaint, this  
18 new complaint?

19 MR. COOPER: May 12th, I believe.

20 MR. SIEVE: Your Honor, I believe, under the rules, we  
21 have 15 days from when Your Honor enters the order denying  
22 the motion. That's how much time we have under the rules  
23 remaining. We had 45 days, and all of that time after the  
24 remand was -- or after the removal was stayed, so we have  
25 15 days left on our original time.



1 THE COURT: Okay.

2 MR. SIEVE: I would also point out, Your Honor, that  
3 it's not -- and I think this is important to understand.  
4 It's not easy or just simple to make copies of disks and  
5 send them over; I understand that.

6 THE COURT: I understand that.

7 MR. SIEVE: And I would point out, Your Honor, that the  
8 issue of what is going to be produced, that was already  
9 produced to Congress and NHTSA, is up for a hearing at the  
10 MDL on Monday, where I understand Mr. Cooper's going to be  
11 applying for a leadership position.

12 So that issue about how those productions are going to  
13 be made and under what protective order and under what  
14 terms, that's all going to be addressed in a larger group,  
15 Your Honor, on Monday. And, obviously, we would think  
16 it's not efficient at all to try to have two different sets  
17 of productions.

18 We would like to get that issue resolved, and we would  
19 ask for Your Honor to -- well, first of all, we have 15  
20 days to respond. We would like to let that hearing go  
21 forward, and then we can work with Mr. Cooper to see if we  
22 can reach an agreement on the best way to do that.

23 THE COURT: So your 15 days would give you until when?  
24 Fifteen days --

25 MR. SIEVE: Well, it runs --

1 THE COURT: -- from the time I enter an order?

2 MR. SIEVE: It runs from the date your order is  
3 entered.

4 THE COURT: So if I entered an order on Monday, you  
5 would have 15 days from then?

6 MR. SIEVE: Correct.

7 THE COURT: Well, Mr. Cooper, that seems reasonable, 15  
8 days.

9 MR. COOPER: That does, Your Honor.

10 MR. SIEVE: And what -- just so the record is clear,  
11 Your Honor, and just so you understand what I'm -- Judge  
12 Furman and the MDL issued an order on Friday, I believe it  
13 was, Thursday or Friday, giving a tentative ruling that he  
14 thought General Motors should begin producing copies to the  
15 counsel in the MDL of the documents that were produced in  
16 NHTSA and Congress, but that issue is tentative. It's up  
17 for discussion on Monday for the first MDL hearing. As I  
18 said, my understanding is Mr. Cooper will be there, so he  
19 can weigh in on that.

20 But, obviously, if the production is made, what we  
21 would like to do is -- he's going to get that production in  
22 that proceeding, anyway, because he's counsel of record.  
23 But we would like to do that one time; we don't want to be  
24 doing that multiple times.

25 MR. COOPER: That's not correct. The judge has

1 limited -- first of all, this case is not the MDL.

2 This is the Melton case, and so I would respectfully  
3 submit that discovery in Melton should proceed pursuant to  
4 the Georgia rules, and they've agreed to respond within 15  
5 days.

6 I understand Judge Furman has limited discovery, at  
7 this point, given the procedural issues in those cases,  
8 which sounds like it's a -- what he's doing is appropriate.  
9 But we shouldn't be limited in our discovery here because a  
10 judge in New York decides to limit discovery there.

11 And we would submit, and I don't -- and I'm not sure  
12 what counsel is saying, but 15 days means: 15 days from  
13 Monday, there need to be responses and all of the  
14 documents.

15 It shouldn't just be a response and then: We're  
16 coordinating with others and we'll get you the documents at  
17 some point in time in the future.

18 MR. SIEVE: Well, Your Honor, I would --

19 MR. COOPER: Excuse me.

20 MR. SIEVE: I'm sorry; I apologize.

21 MR. COOPER: So 15 days means when you respond, you  
22 either -- you produce all documents, or you produce a  
23 privilege log as to which documents you're withholding, or  
24 both.

25 And if I understand what counsel is intimating, he's

1 going to -- GM wants to have us coordinate with the MDL,  
2 well, that --

3 THE COURT: Hold on.

4 MR. COOPER: I've already made my point.

5 THE COURT: I want to ask a couple of questions.

6 Are the documents that were produced in Congress public  
7 record?

8 MR. SIEVE: Not all of them, Your Honor.

9 THE COURT: Okay. And were the documents that were  
10 produced to NHTSA public record?

11 MR. SIEVE: Not all of them. Well, the documents to  
12 Congress, as I understand it, are not subject to FOIA  
13 requests. So you couldn't go to Congress and ask them to  
14 produce it. The documents that were produced in NHTSA are  
15 subject to FOIA requests, but not all of them.

16 And there are two key issues I want to alert Your Honor  
17 to, aside from the volume issue, because it's -- to be  
18 candid, it is not going to be feasible to produce 1.4  
19 million documents in 15 days. I mean, we're going to begin  
20 the process, obviously, but that's not -- it's a monumental  
21 collection. But there are two issues that need to be  
22 addressed.

23 One is, those documents include personal and private  
24 information of third parties and we need to have some kind  
25 of protective order to address those issues, Social

1 Security numbers, you know, credit information, that kind  
2 of thing that would be subject to privacy concerns, that is  
3 scattered throughout that production and would need to be  
4 protected.

5 THE COURT: What was the date --

6 MR. SIEVE: The other is --

7 THE COURT: What was the date the documents were  
8 produced to Congress?

9 MR. SIEVE: I don't have that. They have been ongoing  
10 productions, Your Honor. They are still producing.

11 THE COURT: Well, give me a rough idea.

12 MR. SIEVE: I don't -- I just don't have that date,  
13 Your Honor.

14 THE COURT: What were the dates of the hearings?

15 MR. COOPER: April 1st and 2nd were the first hearings,  
16 and there were subsequent hearings, I believe, in late --  
17 or early July.

18 THE COURT: Were the documents produced at that time?

19 MR. COOPER: Well, it appears -- again, they're saying  
20 a lot of those documents are confidential, so we haven't  
21 been able to get access, but it appears that they produced  
22 most, if not all, of the documents by April 1.

23 MR. SIEVE: There have been --

24 THE COURT: What about for NHTSA, when were the  
25 documents produced?

1 MR. COOPER: We believe before then. Because they  
2 entered into a consent order for the \$35 million dollar  
3 sanction before that, I believe, so --

4 THE COURT: Before April --

5 MR. COOPER: Yeah.

6 THE COURT: -- of 2014? Okay.

7 This is the problem, Mr. Sieve. You have had months  
8 since April, to now, August, to be reviewing those  
9 documents. You even had outside counsel reviewing those  
10 documents. So a lot of things have been done with those  
11 documents, so I don't think you're starting from ground  
12 zero.

13 And, respectfully, what the judge does in the federal  
14 court will not be what I do, because he's dealing with  
15 different issues and different claims, like class actions  
16 and all kinds of things, I think; I don't know.

17 If you want me to consider things that the judge in the  
18 multidistrict litigation is considering, then you're going  
19 to have to present them individually to this Court and in  
20 this case, and I would give them their respectful  
21 consideration. So I'm not going to wait on what that judge  
22 decides.

23 And I'm not sure you're going to have a lot of leeway  
24 here to say you can't produce documents that you produced  
25 to outside counsel that was hired, and that you produced to

1 two other bodies, and that you've had a lot of people  
2 working on all of this for a long time.

3 So how much more time do you need? I mean --

4 MR. SIEVE: Well, Your Honor, if I -- I just want to  
5 make sure Your Honor -- you understand the logistical  
6 issues.

7 The productions to Congress and NHTSA were made on an  
8 expedited basis with -- because they were made on an  
9 expedited basis without efforts, for example, to redact all  
10 of the personal information that might appear in there,  
11 because that would be information that would not be  
12 subject, presumably, and we could object to the production  
13 of that, if some third-party were to request it. But that  
14 is scattered throughout, like, a million two to a million  
15 four pages, so in order for us to -- we can't do a  
16 document-by-document review.

17 I'm hopeful that we can reach an agreement with  
18 Mr. Cooper on an appropriate protective order, so that we  
19 can just make a bulk production to him, and then if there  
20 are issues, we can deal with them on a document-by-document  
21 basis.

22 But copying those documents is going to take time, I'm  
23 told, from General Motors, because they are still producing  
24 documents to NHTSA and Congress, so they are in the process  
25 of doing that.

1 My understanding is we would need another 30 days in  
2 order to be able, beyond the 15, so, 45 days, in order to  
3 be able to get the copies made and to address the  
4 protective order issues.

5 When I said we had 15 days. I meant that was the 15  
6 days remaining from the original timing, but we're going to  
7 need more time than that, Your Honor. We can't just -- you  
8 can't just slip in a disk and copy all that; it's a  
9 monumental task.

10 And what I was talking about with Judge Furman in the  
11 MDL is, they are in the process of doing exactly what we're  
12 talking about here, which is talking about a procedure for  
13 getting those documents produced; that's what he has asked  
14 to be addressed on Monday morning. And so my hope was that  
15 if there was a procedure that was acceptable up there, that  
16 we could use the same procedure down here and get those  
17 documents out.

18 I'm just trying to avoid doing two different things;  
19 having two different protective orders and two different  
20 sets of scheduling because it is, really, Your Honor, a --  
21 it's a Herculean task to get all this stuff prepared.

22 (Brief pause.)

23 MR. SIEVE: What I'd like to do, Your Honor, while  
24 you're looking at that, I'd like to begin discussions with  
25 Mr. Cooper and see if we can agree on a protective order



1 that will speed this process along.

2 If we can't, we can come back before you with any  
3 narrow issues for you to resolve. But I'm optimistic we  
4 can do that, and then we can get the production going.

5 THE COURT: Well, the 15th day would be the 26th.  
6 Mr. Cooper, what do you see is reasonable to reach at  
7 the 15th day?

8 MR. COOPER: Excuse me, Your Honor? What would be  
9 available to what?

10 THE COURT: What would be reasonable for GM to be able  
11 to do by the 15th day?

12 MR. COOPER: Produce all of the documents they've  
13 already produced.

14 MR. SIEVE: We can't --

15 MR. COOPER: Wait, wait just a second.

16 MR. SIEVE: I'm sorry.

17 MR. COOPER: They've had --

18 THE COURT: He just explained that that would be hard.  
19 Well, I think that a certain number of documents could  
20 be produced by then; maybe not all of them. I think the  
21 responses could be given by then, the privilege logs,  
22 things like that.

23 Or have y'all not been doing anything --

24 MR. SIEVE: No, no, we --

25 THE COURT: -- while this was pending?

1 MR. SIEVE: Well, Your Honor, we, to be clear --  
2 THE COURT: I've been working. Have you been working?

3 MR. SIEVE: Yes, I've been working hard, Your Honor,  
4 really hard.

5 There is a privilege log that is being prepared for the  
6 NHTSA and congressional productions.

7 THE COURT: Okay.

8 MR. SIEVE: And we did intend to provide that to Mr.  
9 Cooper.

10 But, and I know Your Honor hasn't looked at the  
11 document requests, but Mr. Cooper's requests, on their  
12 face, are requesting broad swaths of obviously privileged  
13 documents.

14 THE COURT: I've looked at them.

15 MR. SIEVE: Yeah, and so --

16 THE COURT: He is requesting a lot of privileged  
17 documents.

18 MR. SIEVE: Right. And we're going to object, I'm just  
19 telling you, on privilege grounds for that. And a lot of  
20 the documents are in the possession of third parties.  
21 We've begun the process of asking them to provide them to  
22 us; we have not gotten responses.

23 But we're not going to be able to do logs in 15 days,  
24 Your Honor, for the -- I think he's asked for logs on seven  
25 requests. And that process is ongoing.

1 I mean, I'm -- right now, we're gathering internal  
2 General Motors legal staff documents that were not produced  
3 to NHTSA or Congress, so that I can review them in this  
4 case.

5 And, Your Honor, I would respectfully ask until the end  
6 of September. I mean, we can begin producing documents on  
7 a rolling basis. I have no problem with that, but -- and  
8 we can provide written responses by the 26th, for sure.

9 THE COURT: I want written responses by August 26th,  
10 and then document responses by September the 26th, or  
11 detailed and specific information as to what's missing and  
12 why and when it would be produced. Does that order make  
13 sense to you?

14 MR. SIEVE: Yes, Judge.

15 THE COURT: Okay.

16 MR. SIEVE: Thank you.

17 MR. COOPER: One additional point I want to bring up,  
18 because it sounds like we're going to have an issue, is in  
19 the Valukas report, they detailed communications between  
20 outside counsel in Melton and in-house counsel, and  
21 communications among in-house counsel dating back to 2005,  
22 and, you know, this isn't teed-up today, but it's our  
23 position that all has been waived.

24 And so, just so that Your Honor is aware that -- they  
25 got their side of the story out through Mr. Valukas, which

1 includes a lot of confidential information. If they've  
2 chosen to disclose that, for whatever reason, you know, our  
3 position is all of that is waived and --

4 THE COURT: You will have to submit that via the  
5 proper --

6 MR. COOPER: Okay.

7 THE COURT: -- motion. And I do want to make -- that  
8 brings to mind, I do want to make something clear.

9 Mr. Ingram and Mr. Cooper, I could probably throw a  
10 rock, practically, at their office. I don't know about Mr.  
11 Cooper; I'm not sure where his office is, but it's nearby.  
12 All the rest of you guys are from somewhere else -- well,  
13 Mr. Hall is nearby. The rest of you guys are from  
14 somewhere else.

15 But I'm going to be setting down hearings, and there's  
16 a lot of lawyers involved in this case and so everybody may  
17 not be able to be at every hearing. But if we have  
18 trouble, I'm going to start setting down status conferences  
19 because I want to resolve the case and I want it resolved  
20 as soon as possible or, at the latest, April of 2016.

21 MR. SIEVE: That's understood. And, Your Honor, and if  
22 you give me a day, I'll be here so --

23 THE COURT: Wonderful.

24 MR. SIEVE: But I understand.

25 THE COURT: Because y'all are all smart guys. I think

1 you're missing a lady or two here though. I think that  
2 y'all would be doing better if you had --

3 MR. SIEVE: We've got some coming, Your Honor, some  
4 really smart ones, smarter than me. Thank you, Judge.

5 THE COURT: Well, I don't know about that, but it  
6 always helps to throw a lady in the mix to keep you  
7 straight.

8 Any other matters I need to deal with?

9 MR. COOPER: No, Your Honor.

10 MR. SIEVE: Thank you.

11 THE COURT: Thank you.

12 MR. INGRAM: Thank you, Your Honor. Thanks, again, for  
13 doing this on Saturday.

14 THE COURT: Thank you.

15 Mr. Cooper?

16 MR. COOPER: Yes, Your Honor.

17 THE COURT: I would say that you prevailed. Would you  
18 write a more detailed order than what you submitted as a  
19 proposed order?

20 MR. COOPER: Yes.

21 THE COURT: And, Mr. Hall, I don't think that we had an  
22 amended answer; that doesn't mean you didn't file one. I  
23 have not seen one, and that would be sufficient.

24 But I did want to let you know that our computer system  
25 is down because they are doing maintenance today, but we

1 don't have one in the file and I have all of the pleadings  
2 with me, so out of an abundance of caution, would you re-  
3 file that amended answer?

4 MR. HALL: Yes, Your Honor. And we will also do a  
5 formal notice of appearance.

6 THE COURT: Okay. Because I have the answer by  
7 Freeman, Mathis, and Gary; I have the withdrawal of the  
8 cross-claims; and then the next thing I have is you being  
9 served by other parties. Okay?

10 MR. HALL: Yes, Your Honor. Thank you.

11 THE COURT: Thank you.

12 (Proceedings concluded.)

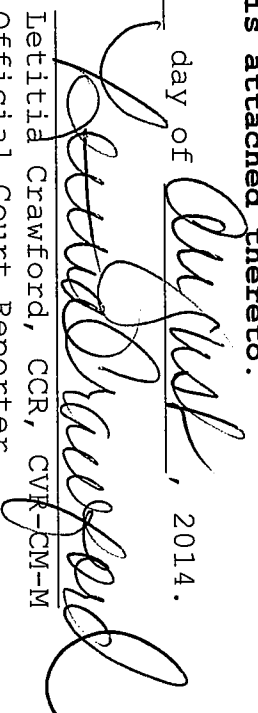
C E R T I F I C A T E

STATE OF GEORGIA  
COUNTY OF COBB

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This the 24 day of August, 2014.

  
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